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Nos. 1507 & 1556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

CLYDE A. PERKINS, *Petitioner*,

v.

STANDARD OIL COMPANY OF CALIFORNIA, *Respondent*.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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These cases involve applications under Section 4 of the Clayton Act, 15 U.S.C. § 15, for "a reasonable attorney's fee" for legal services performed on behalf of petitioner in this Court, resulting in reinstatement of a jury verdict improperly set aside by the Ninth

Circuit. *Perkins* v. *Standard Oil Co. of California*, 395 U.S. 642 (1969). Both the district court (Pet. 1556) and the court of appeals (Pet. 1507) refused to entertain Perkins' applications, holding that they lacked jurisdiction to consider the matter.

The essence of Standard's position is that the decisions below "followed the salutary practice that attorneys' fees are to be awarded by the court best in the position to determine the value of the services rendered, i.e., the panel which heard the proceedings" (Br. in Opp., p. 4). We would agree that if the lower courts are deemed not to have jurisdiction over the matter, this Court should make an appropriate award (see Pet. 1507, p. 9). It is our position, however, that the district court is the proper forum to conduct a hearing and pass upon the application in the first instance, and that the courts below erred in ruling that it lacked jurisdiction to do so.

(1) Standard does not controvert our contentions that compensation for appellate legal services is properly includable in an award of attorneys' fees under Section 4 of the Clayton Act (Pet. 1507, p. 5); that failure to make such an award undercuts the purpose of the statute to compensate successful private antitrust plaintiffs for "*all* the legal services necessary to recover their damages" (Pet. 1507, p. 6) (emphasis added); and that such awards are a matter of right pursuant to statutory mandate, not judicial discretion (Pet. 1556, p. 6). Indeed, Standard says not one word in defense of the district court's ruling that Section 4 "cannot . . . be interpreted to authorize the allowance of attorneys fees at the appellate stage of the proceedings" (Pet. 1507, p. 11a)—a ruling directly contrary to the holding of *American Can Co.* v. *Ladoga*

Canning Co., 44 F.2d 763, 772 (7th Cir. 1930), *cert. denied*, 282 U.S. 899 (1931) (see Pet. 1556, pp. 5-6).

(2) Standard's sole argument is that since this Court's mandate "expressly specified the costs to be awarded to petitioner," and did not include attorneys' fees, the mandate precluded an award of attorneys' fees for the services performed in this Court (Br. in Opp., pp. 3-4). Standard suggests that a different result might be had where "the mandate does not include a direction as to costs" (Br. in Opp., p. 6). The basic fallacy in this argument is that, under Rule 57 of the Revised Rules of this Court, the costs awarded in the *Perkins* mandate ("Clerk's costs" and "Printing of record," see Pet. 1507, p. 13a) are automatically awarded by the clerk in each case where this Court reverses a lower court judgment, unless the Court specifically orders otherwise.[1]

We submit that the rule's provision for the award of filing fees and record printing costs cannot reasonably be interpreted to preclude a hearing on an application for attorneys' fees pursuant to statutory au-

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[1] Rule 57 provides as follows in pertinent part:

> 2. In cases of reversal or vacating of any judgment or decree by this court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered by the court. . . .
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> * * * *
>
> 3. The cost of printing the appendix in this court is a taxable item. The cost of printing briefs, motions, petitions, and jurisdictional statements is not a taxable item.
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> * * * *
>
> 6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail. . . .

thorization, and Standard cites no case so holding. This is particularly true where, as here, Perkins had no right to apply for appellate attorneys' fees until this Court's judgment was entered (Pet. 1506, pp. 7-8)—another point not disputed by Standard. As we note in the petition in No. 1507 (p. 7), in cases where this Court has reinstated private antitrust judgments it uniformly has not mentioned attorneys' fees in its mandates, leaving the question open for consideration by the lower courts. Standard erroneously states that in those cases "the question of *costs* was left open by the mandate" (Br. in Opp., p. 7 (emphasis added)). On the contrary, there, as here, "costs" were awarded, but attorneys' fees were left open. See, *e.g., Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, Nos. 335 & 463, O.T. 1967, mandate dated June 17, 1968 ("Clerk's costs —$150.00, Printing of record—$7339.50"). To the same effect is *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), where, in a non-antitrust equity proceeding, it was held that the specification of costs in appellate court mandates did not preclude a subsequent award of attorneys' fees by the district court. The Court, speaking through Mr. Justice Frankfurter, stated that since attorneys' fees had not been directly in issue before the appellate courts, their disposition by the mandates of those courts (*id.*, at 168)—

> could be implied only if a claim for such costs was necessarily implied in the claim in the original suit, and its failure to ask for such costs an implied waiver. These implications are repelled by the basis on which such costs are granted. They are not of a routine character like ordinary taxable costs; they are contingent upon the exigencies of equitable litigation, the final disposition of which in its entire process including appeal place such

> a claim in much better perspective than it would have at an earlier stage.[2]

(3) Had this been a case in which a jury verdict was erroneously set aside by the district court, and no hearing on trial attorneys' fees was held; the court of appeals affirmed; and this Court reinstated the jury verdict, Perkins unquestionably would have been entitled to a hearing in the district court on an application for attorneys' fees covering both trial and appellate services. See *Trans World Airlines* v. *Hughes*, 1970 Trade Cases ¶ 73,142 (S.D.N.Y. 1970); *Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), 207 F.Supp. 856, 864 (D.Md. 1962).[3] Perkins should not be penalized, with his award of reasonable attorneys' fees lessened, because at the trial (in 1963) the district court reached the correct result and only the

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[2] *Kansas City Southern Ry.* v. *Guardian Trust Co.*, 281 U.S. 1 (1930), another non-antitrust equity case relied upon by Standard (Br. in Opp., p. 6), is not to the contrary. There, this Court merely held that failure to appeal from a court of appeals' decision—rejecting "suggestions" for attorneys' fees made originally to it—barred a "subsequent application" therefor in the district court. See *Ticonic*, *supra* at 168 fn. 7.

[3] In *Osborn* the district court awarded appellate attorneys' fees without an express direction from the court of appeals—a result in conflict with the decisions below. The *Osborn* appellate court's only direction was for further hearings on *damages*, remanding for (286 F. 2d, at 840)—

> additional evidence on the question of damages in the period before as well as after the termination of the lease. The District Court should then determine what items, if any, are recoverable.

Standard quotes the " 'what items * * * are recoverable' " language out of context in suggesting that the court of appeals expressly covered attorneys' fees in its remand order (see Br. in Opp., pp. 5 fn. 3, 6 fn. 4).

Ninth Circuit erred by setting aside the jury verdict on a rationale characterized by this Court as "wholly an artificial one . . . completely unwarranted by the language or purpose of the [Robinson-Patman] Act." 395 U.S. 642, 647.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

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